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February 27, 2017

Allison Silberberg
Mayor of Alexandria
Alexandria City Hall
301 King Street
Alexandria, VA 22314

Re: **Notice of Intent to Sue the City of Alexandria for Clean Water Act and Resource Conservation and Recovery Act Violations at the Oronoco Street Outfall Site**

Dear Mayor Silberberg:

This letter constitutes a Notice of Violation and Intent to File Suit under Section 505 of the federal Clean Water Act, 33 U.S.C. § 1365, for the unlawful discharge of pollutants from a point source to waters of the United States, and under Section 7002(a)(1)(B) of the federal Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B), for contributing to an imminent and substantial endangerment to human health and the environment. The illegal discharges at issue, and the cause of the imminent and substantial endangerment to human health and the environment, are the City of Alexandria's release of pollutants from the Oronoco Street Outfall into the Potomac River, a navigable water of the United States, and resulting contamination of the River and sediments. These pollutants include coal tar and creosote, and their chemical break-down products (collectively, "coal tar and creosote wastes"). Following 90 days from the date of this notice letter, Potomac Riverkeeper Network intends to file suit against the City of Alexandria as the operator and permittee for the Oronoco Street Outfall for the ongoing discharge of coal tar and creosote wastes into the Potomac River and for contributing to the disposal of hazardous wastes that present an imminent and substantial endangerment to human health and the Potomac River ecosystem. Potomac Riverkeeper Network will ask the Court to grant injunctive relief to halt the illegal discharge and to remedy the endangerment.

Potomac Riverkeeper Network

Potomac Riverkeeper, Inc., d/b/a Potomac Riverkeeper Network, is a nonprofit environmental organization that protects and safeguards the ecological integrity of the Potomac River watershed, which includes the Potomac, Upper Potomac, and Shenandoah Rivers and their tributaries. The health of the Potomac River is of critical importance to the nearly six million people who depend upon it for drinking water, as well as those who use the River and its

tributaries for recreation. Potomac Riverkeeper's work has helped communities in Virginia, Maryland, the District of Columbia, Pennsylvania, and West Virginia. Our successes range from compelling a Virginia sewage treatment plant to reduce its annual nutrient pollution by 60,000 pounds annually, to eliminating pollution from rural septic tanks to tributaries of the Potomac River. Potomac Riverkeeper Network files this notice letter on behalf of its members who are being harmed by the discharge of pollutants described below.

Potomac Riverkeeper Network has standing to bring this action because its members depend upon the Potomac for drinking water, and regularly enjoy recreational activities including kayaking, fishing and paddling in this area of the Potomac River. *See Friends of the Earth v. Laidlaw Environmental Servs.*, 528 U.S. 167, 181 (2000) ("An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interest at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.")

The Clean Water Act

The Clean Water Act ("CWA") prohibits the discharge of pollutants from a point source to waters of the United States except in compliance with a National Pollutant Discharge Elimination System ("NPDES") permit. 33 U.S.C. § 1311(a); 33 U.S.C. § 1342. The CWA defines "pollutant" to include "chemical wastes," among other things. "Point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe ... channel, tunnel, conduit" or "discrete fissure ... from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The Oronoco Street Outfall discharges pollutants directly into the Potomac River and constitutes a "pipe ... channel, tunnel, conduit" or "discrete fissure ... from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Additional conduits and fissures associated with the Oronoco Street Outfall are also discharging pollutants into the Potomac River. Thus, as described in detail below, the ongoing discharge of coal tar and creosote wastes from the Oronoco Street Outfall, and related point sources, into the Potomac River is a discharge of pollutants under the CWA.

Under federal and Virginia law, no person, including municipalities, may discharge pollutants to waters of the United States or the waters of Virginia without a NPDES permit. 33 U.S.C. § 1311(a); Va. Code § 62.1-44.5. Although the CWA is a federal law, each state may, upon application and approval by EPA pursuant to 42 U.S.C. § 1342(b) and 40 C.F.R. § 123.61, receive delegated authority to administer the NPDES permit program. Virginia received approval to administer the NPDES program as the Virginia Pollution Discharge Elimination ("VPDES") program in April 1975. EPA separately approved under the CWA, as a part of the VPDES program, the Virginia Soil and Water Conservation Board and the Department of Conservation and Recreation to administer the Municipal Separate Storm Sewer Systems ("MS4") permitting program on January 29, 2005. This program was transferred to the State

Water Control Board and the Virginia Department of Environmental Quality ("VADEQ") on July 1, 2013.

The City of Alexandria is currently subject to the Phase II Municipal Separate Storm Sewer System Permit VAR040057 ("MS4 Permit") as provided in 9 VAC § 25-890-40. This is a general permit that authorizes the discharge of municipal stormwater so long as the permit holder complies with all applicable regulations and permit terms. Among these permit terms is a requirement that the City of Alexandria prohibit non-stormwater discharges from the storm sewer system unless they are authorized by a separate, individual VPDES permit. *Id.* § II.B.3.b. "Stormwater" is defined as "precipitation that is discharged across the land surface or through conveyances to one or more waterways and that may include stormwater runoff, snow melt runoff, and surface runoff and drainage." Va Code § 62.1-44.15:24.

Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act ("RCRA") regulates the storage, transportation, treatment, and disposal of solid and hazardous wastes. A "solid waste" is defined as any garbage, refuse, … and other discarded material, including solid, liquid, semisolid, or contained gaseous material from industrial, commercial, mining, and agricultural operations…." 42 U.S.C § 6903(27). Coal tar and creosote wastes are solid wastes under RCRA. The City of Alexandria has disposed of, and continues to dispose of, those solid wastes into the Potomac River. The continued presence of those hazardous wastes into the surface water and sediments of the Potomac River presents an imminent and substantial endangerment to health and/or the environment.

RCRA allows "any person" to file suit against any other person, defined to include "the United States and any other governmental instrumentality or agency," who was or is a "past or present generator … who has contributed or who is contributing to the … present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). To file suit against a defendant whose conduct contributes to an imminent and substantial endangerment, a plaintiff does not have to demonstrate that the defendant's actions violated RCRA's regulatory programs or a RCRA-based permit. *Goldfarb v. Mayor and City Council of Baltimore*, 791 F.3d 500, 505 (4th Cir. 2015). Instead, one filing suit under RCRA need only show that the defendant is contributing to conditions that may present a danger to human health or the environment. *307 Campostella, LLC v. Mullane*, Case No. 15-cv-00224 (E.D. Va. Oct. 29, 2015).

Discharges of Coal Tar and Creosote Wastes from the Oronoco Street Outfall

Potomac Riverkeeper's investigation reveals that the Oronoco Street Outfall, a point source covered by the City of Alexandria's MS4 Permit, has been illegally discharging coal tar and creosote wastes into the Potomac River on a continuous basis since at least 1975. Samples of the pipe discharge taken as recently as September 2016 confirm that illegal discharges persist.

Coal tar is a petroleum product and a by-product of the process of using coal to produce natural gas. Agency for Toxic Substances and Disease Registry, Toxicological Profile for Wood Creosote, Coal Tar Creosote, Coal Tar, Coal Tar Pitch, and Coal Tar Pitch Volatiles (Sept. 2002) ("Coal Tar Tox Profile") at 1-2. Creosote is a distillation product of coal tar. *Id.* Humans can be exposed to coal tar and creosote compounds through inhaling its fumes, contact with the skin, or ingesting soil or water containing the compounds. *Id.* at 5-6. Once people are exposed to coal tar and creosote compounds, they can suffer adverse health effects, including cancer, liver and kidney damage, irritation of the respiratory tract, or damage to the skin and corneas. *Id.* at 7. Creosote and coal tar compounds also include a large group of chemicals called polycyclic aromatic hydrocarbons ("PAHs"). ATSDR, Public Health Statement, Polycyclic Aromatic Hydrocarbons (August 1995) at 1. Several PAHs are present in the soil and groundwater upgradient of the Oronoco Street Outfall. Many of these are classified as probable human carcinogens. *Id.* at 4.

Benthic and aquatic organisms can also be exposed to coal tar and creosote compounds that are in surface waters and sediments. Coal Tar Tox Profile at 4-5. Exposure to these compounds can inhibit growth and prevent root growth in aquatic plants. World Health Organization, Concise International Chemical Assessment Document 62, Coal Tar Creosote (2004) at 82-83, *available at* http://www.who.int/ipcs/publications/cicad/en/CICAD62.pdf. Invertebrates exposed to coal tar and creosote compounds can suffer from reduced shell deposition, decreased growth rates, impaired reproduction, and increased susceptibility to infectious disease. *Id.* at 83. Coal tar and creosote compounds in aquatic sediments can be toxic to mollusks, such as Eastern oysters and shrimp. *Id.* at 83-85 (discussing study of coal tar and creosote contamination in the Elizabeth River). In surface water and sediments, coal tar and creosote compounds can also be acutely toxic to fish embryos by causing reduced hatching success, the development of skeletal and heart deformities and other physical abnormalities. *Id.* at 85-87. Documents prepared on behalf of the City of Alexandria acknowledge that PAH concentrations detected near the Oronoco Street Outfall site are a potential danger to marine and aquatic organisms and the animals that feed on them. *See, e.g.*, Marshal Miller & Associates 2013. Revised Remedial Action plan – Off Site Sediment. Prepared for the City of Alexandria. February 1, 2013.

Records created by VADEQ, the U.S. Coast Guard, the U.S. Environmental Protection Agency, the Agency for Toxic Substances and Disease Registry, the Alexandria City Fire Department, and by or on behalf of the City of Alexandria explain that the City of Alexandria owned the former Alexandria Gas Company, a manufactured gas plant, from approximately 1851 until 1930, selling its interest in the site before its closure in 1946. The gas plant property, formerly located at the corner of Oronoco Street and Lee Street, generated large volumes of coal tar and creosote wastes. A 1994 Screening Site Investigation by VADEQ and a 2002 site characterization report by the City of Alexandria's contractor concluded that the soil and groundwater under the current Lee Street and Union Street properties are heavily contaminated with coal tar and creosote wastes.

Since at least 1975, these wastes have migrated from the Alexandria Gas Company site to the Oronoco Street Outfall storm sewer pipe and have been discharged into the Potomac River, where they are present in the surface water and sediments. Coal tar and creosote wastes have also migrated through the soil and continue to seep up from the sediments near the Oronoco Street Outfall. According to documents generated by, or on behalf of, the City of Alexandria, these discharges and seeps of coal tar and creosote wastes have resulted in an observable sheen on the water, sediment contamination, and a noticeable odor of creosote. Visual and olfactory observations show that coal tar and creosote wastes continue to be discharged from the Oronoco Street Outfall and continue to migrate from the underlying sediments.

The City of Alexandria installed absorption booms near the Oronoco Street Outfall in 1979 at the request of the U.S. Coast Guard and a floating containment boom in 2000. However, documents and visual observations demonstrate that those booms are poorly maintained and have failed to contain the contamination. Prior studies of the site confirm that coal tar and creosote wastes have been distributed into the greater Potomac River for decades by wave activity, tidal influences, propeller wash, and other activities. Documents prepared for the City of Alexandria acknowledge that coal tar and creosote wastes extend north and south of the outfall for distances of up to 750 feet and eastward into the river for distances of up to 175 feet..

Site investigations conducted by the City of Alexandria's contractors, as well as sampling by federal agencies, have shown that the following contaminants are present at concentrations above background levels in the sediments and/or surface water near the Oronoco Street Outfall and in the broader Potomac River, beyond and downstream of the containment booms.

Inorganic Contaminants	
Aluminum	Iron
Arsenic	Magnesium
Barium	Manganese
Cadmium	Mercury
Calcium	Nickel
Chromium	Potassium
Cobalt	Vanadium
Copper	Zinc
Volatile Organic Compounds	
Dibromochloromethane	Ethylbenzene
1,1,2-trichloromethane	Styrene
Benzene	Total Xylene
Toluene	1,2-dichloroethane
Polycyclic Aromatic Hydrocarbons	
4-methylphenol	Chrysene
Naphthalene	Bis(2-ethylhexyl)phthalate

2-methyl naphthalene	Anthracene
Acenapthylene	Fluoranthene
Acenaphthene	Benzo(b) fluoranthene
Dibenzofuran	Benzo(k) fluoranthene
Fluorene	Benzo(a) pyrene
Phenanthrene	Indeno(1,2,3-cd) pyrene
Fluoranthene	Dibenz(a,h) anthracene
Pyrene	Benzo(g,h,i) perylene
Benzo(a)anthracene	

E.g., Marshal Miller & Associates 2001. Preliminary Site Investigation Report, Alexandria Town Gas—Oronoco Outfall Site. Prepared for the City of Alexandria. January 25, 2001; Marshal Miller & Associates 2013. Revised Remedial Action plan – Off Site Sediment. Prepared for the City of Alexandria. February 1, 2013.

Sediment sampling shows that these contaminants are present at elevated concentrations at, and downstream of, the Oronoco Street Outfall, demonstrating that the Oronoco Street Outfall is the likely source of these contaminants, as demonstrated by the City of Alexandria's own analysis.

The Discharges from the Oronoco Street Outfall Violate the CWA

The ongoing discharges of coal tar and creosote constituents into the Potomac River from the Oronoco Street Outfall are not authorized by the City of Alexandria's MS4 Permit and are unlawful. Among the obligations imposed on the City of Alexandria under the MS4 Permit is the duty to detect and eliminate "illicit discharges." MS4 Permit § II.B.3. This requires the City of Alexandria to prohibit non-stormwater discharges from the storm sewer system that are not otherwise permitted by a separate, individual VPDES permit. *Id.* § II.B.3.b. As the ongoing discharge of coal tar and creosote wastes are "illicit discharges," and not "stormwater" discharges, their continued discharge constitutes a violation of the MS4 Permit. Further, because the City of Alexandria does not have an individual NPDES permit that authorizes the ongoing discharge of coal tar and creosote wastes, the City of Alexandria is in violation of the CWA. 42 U.S.C. § 1311(a) ("the discharge of any pollutant by any person" that is not pursuant to a NPDES permit "shall be unlawful").

The Discharges from the Oronoco Street Outfall Present an Imminent and Substantial Endangerment to Human Health and the Environment Under RCRA

For at least forty years, coal tar and creosote wastes have been discharging into the Potomac River via the Oronoco Street Outfall and migrating into the Potomac River sediments. As described above, it is well known that coal tar and creosote wastes can endanger human health and the environment. The Oronoco Street Outfall, and the coal tar sheen at its mouth, lies

adjacent to Founders Park, a recreational area used by many residents of Alexandria, including members of Potomac Riverkeeper. Further, the Potomac River is frequently used for kayaking, paddling, and recreational fishing by the general public, including members of Potomac Riverkeeper. Coal tar and creosote wastes break down into several constituent wastes, including PAHs, phenols, ammonia, cyanide, volatile organic compounds, and semi-volatile organic compounds. Some of these substances volatilize into the air and are responsible for the strong creosote smell that can be observed in the areas nearby the Oronoco Street Outfall. Members of the public, including members of Potomac Riverkeeper, are exposed to these fumes when using Founders Park and the section of the Potomac River near the Oronoco Street Outfall. As described above, coal tar and creosote wastes, and their breakdown products, are linked to adverse health effects, including cancer, liver or kidney damage, and irritation of the respiratory tract. Coal Tar Tox. Profile at 7. Other substances that may be related to other historic industrial sites, including metals and pesticides, have also been confirmed to discharge from the Oronoco Street Outfall or migrate to sediments and surface waters through groundwater. The ongoing, uncontrolled exposure of the public to coal tar and creosote fumes presents an imminent and substantial endangerment to public health. Coal tar and creosote compounds in water and sediment also result in a number of severe adverse impacts on benthic and aquatic life, as described above, constituting an imminent and substantial endangerment to the Potomac River ecosystem.

The Need for More Effective and Complete Characterization and Remediation

In March 2000, the City of Alexandria applied to have the Oronoco Street Outfall site entered into Virginia's Voluntary Remediation Program ("VRP") to avoid a threatened enforcement action by the U.S. Environmental Protection Agency. It was accepted into the VRP in May 2000. A contractor retained by the City of Alexandria installed a floating containment boom in the immediate vicinity of the Oronoco Street Outfall in 2000, more than 20 years after the discharges of coal tar and creosote began. Sediment samples were collected and analyzed in late 2000 by the City's contractor to determine the lateral and vertical extent of contamination. A site characterization report, prepared in 2002, estimated that the impact from these coal tar and creosote wastes associated with the Oronoco Street Outfall extends approximately 750 feet along the shore of Founders Park to the south, approximately 500 feet to the north, and eastward for approximately 175 feet. Steps were taken to address the ongoing contamination of the area including the installation of a free product recovery system in January 2004, bio-sparging wells and a permeable reactive barrier in 2013, and slip-lining portions of the Oronoco Street storm water pipe in 2009 and 2013. Despite the work to recover free product and to slip-line the Oronoco Street storm water pipe, Riverkeeper's sampling indicates coal tar-related contaminants continue to discharge from the Oronoco Street Outfall both within and outside of the slip-lined pipe and into the Potomac River. Analysis Report, Oronoco Outfall, prepared by Eurofins Lancaster Laboratories Environmental, September 14, 2016; Analysis Report, Oronoco Outfall, prepared by Eurofins Lancaster Laboratories Environmental, October 3, 2016. Since bringing evidence of this ongoing discharge of contaminants to the City's attention in November 2016, the City has undertaken steps to identify and address the coal tar contaminants that continue to

enter the unlined portions of the outfall pipe; however, to date, the City has not presented a long-term solution to prevent additional contaminants from seeping into the outfall pipe and eventually discharging into the Potomac River.

In addition to failing to eradicate the ongoing discharge of contaminants into the Potomac River, the City has not gone far enough to fully characterize the impacted sediments. In June 2011, sediment samples were collected, tested, and compared to results from the 2000 samples. The City's contractor devised a remediation plan that included removal of sediments having total Polycyclic Aromatic Hydrocarbon (tPAH) concentrations in excess of the Probable Effect Concentration (PEC) limit of 22.8 mg/kg established by MacDonald et al. 2000 and adopted by the Wisconsin Department of Natural Resources in its sediment quality guidelines. Wisconsin Department of Natural Resources (2003). Consensus-Based Sediment Quality Guidelines – Recommendations for Use and Application, Interim Guidance. December 2003, WT-732-2003. The removal plan targeted an area for dredging bounded by the Robinson Terminal Pier to the north. As claimed in the 2013 Remedial Action Plan, contaminants in the areas beyond the impacted halo will not be dredged because they have been undergoing significant attenuation or degradation. Based on this claim, these areas will be subject to a 2-year monitoring program with annual sampling to document the progress of natural recovery. While the PEC limit adopted by the Wisconsin DNR may be an effective method for determining the impacted area that requires dredging, the City's contractor did not adhere to the Wisconsin DNR's sediment quality guidelines because its sediment sampling did not analyze the impacted sediments for the entire profile of PAHs included within the PEC. Additionally, the 2011 samples demonstrated tPAH levels exceeding the PEC limit outside of the proposed dredge area. As a result, the under-inclusive proposed dredge area does not encompass the actual impacted area of sediments containing tPAH levels in excess of the PEC limit.

In the Spring of 2016, a pre-design investigation was conducted to evaluate the sediments for visual evidence of impacts and to collect analytical data to address gaps identified within the proposed dredge and reactive cap areas. It is Potomac Riverkeeper Network's understanding that the City of Alexandria is planning to dredge a discrete portion of the sediment directly below the Oronoco Street Outfall and in and around the channel area that extends from the outfall approximately 175 ft eastward into the Potomac River. Sediments will be dredged to a depth of 1 to 3 ft, as specified in the August 2016 Remedial Action Plan, to remove impacts above the PEC within the proposed dredge area. Sediments outside of this area were not sampled and analyzed as part of the 2016 pre-design investigation including the sediments underneath and to the north of the Robinson Terminal Pier.

Potomac Riverkeeper conducted sediment sampling in September and October of 2016, which included sampling of sediments both to the north and to the south of the proposed dredge area. Despite the conclusion in the 2013 RAP about the significant attenuation and degradation of contaminants in areas outside of the impacted halo, Riverkeeper's sediment analyses have indicated tPAH concentrations in excess of the PEC limit to the north of the proposed dredge

area.[1] As a result, the Potomac Riverkeeper requested that the City conduct further sampling both to the south of the proposed dredge area and to the north of the proposed dredge area under the Robinson Terminal Pier in order to fully characterize the extent of contaminated sediments. While the City has conducted further sampling in the area to the south, which demonstrated tPAH concentrations in excess of the PEC limit, the City has not conducted further sampling underneath and around the Robinson Terminal Pier, nor has the City proposed any long-term solutions to address the contaminated sediments in this area.

The migration of coal tar and creosote wastes from the Oronoco Street Outfall has extended outside the containment boom perimeter and the discrete area designated for dredging. There is evidence that the containment booms are poorly maintained and continue to allow coal tar and creosote wastes floating on the surface of the water and in the sediments to migrate into the broader Potomac River. According to a recent report by the City of Alexandria's contractor, the containment boom became detached and required re-positioning four times in a five-week period. As a result of the City's failure to address the contaminated sediments underneath and around the Robinson Terminal Pier, as well as the City's record of poorly maintaining the boom designed to contain the contamination, the Potomac Riverkeeper has expressed concern that passive migration from areas outside of the proposed dredge area will result in the re-contamination of clean sediments once dredging and capping are complete. Even if this were not the case, the City of Alexandria's failure to eliminate the illegal discharges and passive migration from the waste source will likely result in the re-contamination of clean sediments once dredging and capping are complete, assuming this project is completed. As the City's own documents indicate, this dredge project has been solicited, bid, and cancelled on two separate occasions by the City.[2] Clearly, the City of Alexandria's efforts to eliminate these discharges, as required under the CWA and the RCRA, have been too slow in coming, have been too limited in scope, and have failed to ameliorate the imminent and substantial endangerment presented by the coal tar and creosote wastes.

Potomac Riverkeeper will be seeking a court order requiring the City of Alexandria to immediately abate the continued discharge of coal tar and creosote wastes and to characterize and remediate the full extent of the contamination it created in the Potomac River.

Federal Law Authorizes Potomac Riverkeeper to File Suit Against the City of Alexandria

Both the CWA and RCRA have "citizen suit" provisions, authorizing "any person" to file suit against any other person that either violates the CWA or causes or contributes to an imminent and substantial endangerment under RCRA. 33 U.S.C. § 1365(a)(1); 42 U.S.C. § 6972(a)(1)(B). The City of Alexandria is a "person" within the meaning of both the CWA and RCRA. This letter serves to comply with the CWA and RCRA notice requirements under 33 U.S.C. § 1365(b)(1)(A) and 42 U.S.C. § 6972(b)(2), and EPA's implementing regulations, respectively.

[1] Analysis Report, Oronoco Outfall, prepared by Eurofins Lancaster Laboratories Environmental, October 22, 2016.
[2] Notice to Bidders, Addendum 1, Invitation to Bid No. 00000639, Answers to Bidders Questions, City of Alexandria Finance Department Purchasing Division, September 30, 2016.

The names, addresses, and telephone numbers of each person giving notice in this letter are:

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Please address all communications regarding this notice to Potomac Riverkeeper's counsel. The names, addresses, and telephone numbers of counsel representing Potomac Riverkeeper are:

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We intend, following the 90-day notice period, to file a citizen suit in federal court against the defendant, City of Alexandria, under Section 505(a) of the CWA and Section 7002(a)(1)(B) of RCRA for the violations outlined above. Potomac Riverkeeper also reserves its right to assert any other applicable cause of action under state and federal laws in addition to the CWA and the RCRA.

Please do not hesitate to contact me or Potomac Riverkeeper's counsel if you wish to discuss this notice letter.

Respectfully,

P. Phillip Musegaas

Phillip Musegaas
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cc:
Joanna Anderson, Deputy City Attorney, City of Alexandria
Yon Lambert, AICP, Director, Transportation & Environmental Services (T&ES)
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